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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1322

TENNIE WEAVER, *Petitioner*

v.

THE STATE OF ILLINOIS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

EDWARD BENNETT WILLIAMS
PATRICK M. WALL
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

[illegible] Press & Associated Printers, Inc., Washington, D. C.

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Petitioner, Tennie Weaver, prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Illinois, affirming a judgment of the Circuit Court of Rock Island County, Illinois, dated November 22, 1967, convicting him of burglary, possession of burglary tools and felony theft.

OPINION BELOW

The opinion of the Illinois Supreme Court, not yet officially reported, is reprinted herein as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 28, 1968. A timely petition for rehearing was denied on January 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Illinois Criminal Code § 36-1:

> Any vessel, vehicle or aircraft used in the commission of an offense prohibited by Section 9-1, 10-2, 18-2, 19-1, 19-2, 20-1, 20-2 or 28-1 of this Code . . . may be seized and delivered forthwith to the sheriff of the county of seizure. . . . Within . . . [a] 10 day period the sheriff shall . . . notify the State's Attorney of the county of seizure about the seizure.

Illinois Criminal Code § 36-2(a):

> . . . If the State's Attorney does not cause the forfeiture to be remitted he shall forthwith bring an action for forfeiture in the Circuit Court within whose jurisdiction the seizure and confiscation has taken place.

QUESTIONS PRESENTED

1. Was *Preston* v. *United States,* 376 U.S. 364 (1964) overruled by *Cooper* v. *California,* 386 U.S. 58 (1967)?

2. If *Preston* was not overruled by *Cooper*, which of the two cases applies to a warrantless automobile search conducted not, as it could have been, at the scene of its occupants' arrest, but at a police station approximately an hour later, after the booking process had been completed and the automobile was safely under police control?

STATEMENT OF THE CASE

Shortly after midnight on July 31, 1967, two officers of the East Moline, Illinois police department, while on tour in a prowl car, saw petitioner and one Jerry York in a self-service laundromat which was open for business, the latter looking out the front window while the former stood at a vending machine, the door of which was open (44-45).[1] Knowing that laundromats in the neighborhood had recently been subjected to vandalism and thefts (51), the officers entered the laundromat and frisked petitioner and York for weapons, finding none (51-52). Petitioner's pockets were full of a hard substance which felt like coins (52). Both were arrested for theft (55). The police called for assistance, but none was available, since the other squad car was busy (52).

Parked outside the laundromat was an automobile belonging to York who, accompanied by one of the two officers, was permitted to drive it to a police station (54-55). Petitioner, his hands cuffed behind his back, was driven to the station in the prowl car (45-46). No efforts had been made by either officer to search York's automobile at the scene of the arrest (46). At the station house, petitioner was searched; some fifty-six dollars in coins were found in his pockets (52). After being booked, he posted bond and was permitted to leave (46).

York's automobile, which had been temporarily parked in front of the station house, was then driven to the rear and locked by one of the officers (48). The

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[1] Unless otherwise noted, all parenthetical references herein are to the record which has been filed with the Court.

arresting officers told the officers in charge of the shift that they had impounded York's car,[2] and wanted a search warrant for it (39). A judge was phoned, and he gave the officer oral permission to search the car; no search warrant was ever issued (38-39). The arresting officers then searched the car, for the purpose of finding "evidence of theft and the fruits of the crime." (49). The search occurred approximately one hour after the arrest (47). The officers discovered "a plastic bag containing coins, some rings of keys, a bag containing numerous keys." (49). The police turned the automobile over to the sheriff's department either that same day or the next (40), and on August 1, 1967, the sheriff notified the State's Attorney of the seizure (41-42). The State's Attorney commenced forfeiture proceedings on September 11, 1967.

The items obtained by the police in the search of the automobile[3] were introduced against petitioner at the trial, after his pre-trial motion to suppress on Fourth Amendment grounds had been denied.

REASONS FOR GRANTING THE WRIT

This petition involves one of the most persistent issues in the administration of criminal justice—the legality of the search of an automobile—and presents

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[2] Illinois Criminal Code § 36-1 provides in part that: "Any . . . vehicle . . . used in the commission of an offense prohibited by Section 9-1, 10-2, 18-2, 19-1, 19-2, 20-1, 20-2 or 28-1 of this Code . . . may be seized and delivered forthwith to the sheriff of the county of seizure."

[3] The officer who drove petitioner to the station later found, on the passenger side of the front seat of the prowl car, a key which opened the door (but not the cash box) of the vending machine near which he had first seen petitioner earlier that morning (57-58). No issue is raised concerning the validity of that search.

this Court with an appropriate opportunity to end the growing confusion among courts concerning the relationship between two of this Court's rulings: *Preston* v. *United States,* 376 U.S. 364 (1964) and *Cooper* v. *California,* 386 U.S. 58 (1967).[4]

It was made clear in *Carroll* v. *United States,* 267 U.S. 132 (1925), that because of the mobility of automobiles as opposed to fixed structures such as houses, "what may be an unreasonable search of a house may be responsible in the case of a motorcar." *Preston* v. *United States,* 376 U.S. 364, 366-67 (1964). In *Carroll,* the warrantless search of a car was upheld, although not incident to an arrest, because of the car's mobility; to have required the officers to take the time to obtain a warrant would have frustrated the search. The warrantless search of a nonmobile car, however, can be justified, if at all, only when incident to a lawful arrest. And this court held unanimously in *Preston, supra* at 367, that once an accused is under arrest and in custody, then a search [of an automobile] at another place, without a warrant, is simply not incident to the arrest."

The rule seemed clear: the warrantless search of an automobile was justified only when coincident in time and place with a lawful arrest or when the very mobility of the automobile created an emergency, necessitating quick action lest the reasonable search be frustrated. It was in reliance upon that rule that

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[4] The justices who dissented in *Cooper* suggested the possibility that the majority had overruled *Preston sub silentio.* 386 U.S. at 65. This same view has been expressed elsewhere. See, e.g., the concurring opinion of Judge Peters in *People* v. *Webb,* 66 Cal. 2d 107, 424 P. 2d 342 (1967).

the California District Court of Appeals, in *Cooper,* held that the warrantless search of a car which had been in police custody for a week after its owner's arrest on narcotic charges violated the Fourth Amendment. This Court disagreed, on grounds which now need clarification.

In *Cooper,* the officers seized the car in question because state law[5] required that they do so. They were further required to hold the car as evidence pending the outcome of forfeiture proceedings, which might not be (and, in fact, were not) completed for several months. The Court stated that "it would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U.S. at 61-62. Noting that the search "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained," 386 U.S. at 61, this Court sustained its validity.

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[5] California Health & Safety Code § 11611.

This case is not *Cooper,* nor is it controlled by it. The crucial differences between the two are as follows:

Cooper	*Weaver*
The crime for which petitioner was arrested brought the state forfeiture statute into play.	The crime for which petitioner was arrested (theft), is not included in the list of crimes set out in the state forfeiture statute.[6]
The seizure was *required*[7] by the statute.	The seizure was merely *permitted* by the statute.
The statute required the police to hold the vehicle until forfeiture proceedings had terminated.	The statute required the police to turn all seized vehicles over to the Sheriff of the county of seizure *forthwith.*
It was indicated that the police may have conducted the search for purposes of self-protection.	It is undisputed that the police were searching for the fruits and the implements of the theft.

The Supreme Court of Illinois must have been aware of these crucial differences for, although ostensibly following *Cooper,* it failed to refer to those facts which this Court had emphasized in deciding that case.

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[6] See Illinois Criminal Code § 36-1. Burglary and possession of burglary tools, however, are listed in the statute and petitioner was convicted of those crimes as well as of theft. The danger that, in order to justify a warrantless search of a car where they otherwise could not do so, the police may seek, after the search, to bring charges which would make the forefeiture statute applicable, is too obvious to be belabored and too serious to be ignored.

[7] The Supreme Court of California has taken the position that the controlling factor in *Cooper* was that the police seizure was *mandatory.* See *People* v. *Webb, supra* note 4.

Despite *Cooper's* reliance upon the existence of the California forfeiture statute[8] and the obligation of the police to seize and hold the automobile as evidence pending the outcome of forfeiture proceedings, the court below never even mentioned the Illinois forfeiture statute or the fact that the police purported to have impounded York's car, as justification for the search. Despite *Cooper's* intimation that the purpose of the search there in question may have been to protect the police,[9] the court below did not rely, and could not have relied,[10] upon this aspect of the distinction between *Cooper* and *Preston.* It simply stated that: this case was controlled by *Cooper* rather than by *Preston;* the fact that the search occurred after, rather than before, the suspects were taken to the station was "immaterial"; and in the words of *Cooper,* the search was "closely related to the reason petitioner was arrested." Thus, in a single paragraph, the Illinois Supreme Court managed not only to overrule *Preston* as to the time and place of the search, but also to expand *Cooper* far beyond the narrow limits placed upon it by this Court.

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[8] The existence of the forfeiture statute was again emphasized by this Court in *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U.S. 216, 221 (1968). And in *People* v. *Webb, supra* note 4, the Supreme Court of California stated that the controlling fact in *Cooper* was that the police were *required* to seize the car rather than merely being *authorized* to do so. *See also Lockett* v. *United States,* 390 F. 2d 168, 172-73 (9th Cir.), *cert. denied,* 393 U.S. 877 (1968).

[9] The self-protection justification for the search in *Cooper* was mentioned again in *Dyke, supra* note 6 at 221. See also *Williams* v. *United States,* 382 F. 2d 48, 50 (5th Cir. 1967).

[10] The officer who conducted the search stated that its purpose was to uncover the fruits and implements of theft.

In holding "immaterial" the fact that the search followed rather than preceded the trip to the station house, the court below reverted, in effect, to the language and theories employed in the determination of whether a search is sufficiently contemporaneous in time and place to qualify as one incidental to a lawful arrest. The justification for the delay and for the change in locale—the fact that "the other squad car was busy" and that the officers thought it advisable to go to the station house so as to prevent escape[11] —is reminiscent of numerous cases involving a search incident to a lawful arrest. See, e.g.: *United States* v. *Evans,* 385 F.2d 824 (7th Cir. 1967) (search of car properly completed elsewhere than at scene of arrest, where crowd began to gather); *Morris* v. *Boles,* 386 F.2d 395 (4th Cir. 1967) *cert. denied sub nom. Morris* v. *Coiner,* 390 U.S. 1043 (1968) (same); *United States* v. *Rundel,* 269 F. Supp. 1017, 1019 (E.D.Pa. 1967) (car search commenced at scene of arrest "under somewhat awkward circumstances" and in "the mainstream of traffic" was properly concluded elsewhere ten minutes later, since "the arrest was continuing.").

If the Illinois Supreme Court intended to hold that the search was incident to petitioner's arrest, despite the delay and change in locale, then it failed to take into account the basic proposition that once the arrest process and booking are complete, any subsequent search is a wholly independent matter not at all incident to the arrest. See, e.g.: *United States ex rel. Mahoney* v. *LaVallee,* 396 F.2d 887, 889 (2d Cir.

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[11] Despite the purported reason for delaying the search, nowhere can it be found in the record that the officers based their decision on the possibility that petitioner and his friend might attempt to escape.

1968); *United States ex rel. Nickens* v. *LaVallee,* 391 F.2d 123 (2d Cir. 1968).

In justifying the search because it was "closely related to the reason petitioner was arrested," the court below has announced a mischievous doctrine which should be nipped in the bud. This theory of legality —the only one upon which the court relied—would justify police in searching an arrested bootlegger's car for moonshine many days after the arrest and many miles from its scene, even in the absence of a forfeiture statute and a seizure of the automobile. It is a dangerous doctrine indeed, and one which, although purportedly relying upon *Cooper,* strangely ignores the absence of those factors which this Court was so careful to emphasize in that case.

There is a constitutional preference for the use of a search warrant. See, e.g., *United States* v. *Ventresca,* 380 U.S. 102 (1965). Cases, such as *Cooper,* which create exceptions to the normal warrant requirement should be confined to their facts and extended only when it becomes necessary. This Court took pains to spell out the specific facts which, in *Cooper,* were said to justify a relaxation of the warrant requirement, particularly the duty of the police to seize and to keep in their custody, perhaps for many months, the automobile subsequently searched. No such duty ever existed in this case, and the court below made no reference to it, preferring to give an interpretation to *Cooper* so expansive as to overrule *Preston.*

This Court had a clear opportunity in *Cooper,* and again in *Harris* v. *United States,* 390 U.S. 234 (1968), and again in *Dyke,* explicitly to overrule *Preston.* It chose, however, not to do so. What this Court has

thus far been unwilling to do has been done by the Supreme Court of Illinois.

The *Preston* rule, we submit, embodies an important safeguard of Fourth Amendment rights. Its demise would be a misfortune. If still alive, it controls this case. Perhaps those who state that it is dead at the hands of *Cooper* are correct. But if so, its death certificate should be signed by this Court, and not by the Supreme Court of Illinois.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
PATRICK M. WALL
1000 Hill Building
Washington, D. C. 20006
Counsel for Petitioner

APPENDIX

Docket No. 41360—Agenda 31—September, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, *Appellee*,

v.

TENNIE WEAVER, *Appellant*.

MR. JUSTICE SCHAEFER delivered the opinion of the Court:

A jury in the circuit court of Rock Island County found the defendant, Tennie Weaver, guilty of burglary, possession of burglary tools, and theft, and he was sentenced to imprisonment in the penitentiary. On this appeal he attacks the constitutionality of a search of the automobile in which he had ridden to the scene of the alleged crime, contends that one of the three counts of the indictment failed to charge an offense, and challenges the sufficiency of the evidence to establish guilt upon the other two counts —burglary and possession of burglary tools.

While cruising in their patrol car shortly after midnight on July 31, 1967, two officers of the East Moline police department saw two men, the defendant and Jerry York, in a well-lighted self-service laundromat. York was looking out of the front window, and the defendant was at a soft drink vending machine, the door of which was open. The officers knew of recent thefts and vandalism in laundromats located in that area; they drove on, circled, and entered the laundromat a minute or two later. York was still standing at the front window and the defendant had just flushed the toilet in the rest room at the rear of the laundromate. The men told the officers that they had stopped in the laundromat to use a telephone. They were frisked for weapons, and coins amounting to more than $50 were found in the defendant's pockets.

The defendant's hands were cuffed behind his back and he was placed in the front seat of the police car, where

he shifted and squirmed about. York, accompanied by one of the officers, drove his car, which had been parked in front of the laundromat, to the police station. One of the officers, whose suspicions had been aroused by the defendant's squirming movements in the police car, searched the front seat of that car and found a key. The two officers returned to the laundromat and found that the key opened the outer door of the vending machine, although it did not open the coin receptacle. The officers testified that they returned again to the police station to secure a warrant for the search of York's car. The officer in charge of the shift telephoned a judge and was told that a warrant was not necessary. The officers then searched York's car, and found more coins and a plastic bag containing 303 keys, some of which were of the type used to open vending machines, and one of which opened the coin compartment of the machine here in question. Later that morning York's car was turned over to the sheriff, and proceedings for its forfeiture were instituted on the same day.

The defendant testified that he and York had stopped at the laundromat so that York could telephone his wife, and that while York was using the telephone, the defendant went to the restroom. The defendant's former wife, a waitress, testified that shortly before his arrest, he had visited her in the tavern where she worked and that she had given him $40 to $50 in change which she had received as tips. The proprietor of the tavern corroborated her testimony.

The defendant contends that his constitutional rights were violated when his motion to suppress the coins and the bag of keys found in York's car was denied. For this contention he relies upon *Preston* v. *United States* (1964), 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881. In our opinion, however, this issue is controlled not by *Preston* but by *Cooper* v. *California* (1967), 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788. See also *People* v. *Carter,* 38 Ill.2d

496, 500; *People* v. *Nugara* (1968), 39 Ill.2d 482, *cert. den.*, —— U.S. ——, —— L. Ed. 2d ——.

In our opinion the conduct of the officers was reasonable. When they first saw the suspects, one of them was apparently on guard at the front window while the other was busy with the vending machine. We regard as immaterial the fact that the search of the automobile took place after, rather than before, the suspects were taken to the station. The officers testified that they had radioed for assistance but that "the other squad car was busy." Their judgment that it was advisable to take the suspects to the station in order to prevent escape instead of searching the car at the scene, is not, in our opinion, subject to criticism. In a situation of this kind it is impossible for police officers to do simultaneously everything that needs to be done, and the fact that some steps are necessarily given priority over others does not affect their legality. The search in this case was, in the language of *Cooper* v. *California,* "closely related to the reason petitioner was arrested." (386 U.S. at 61, 17 L. Ed. 2d at 733.) We hold, therefore, that the search of the car was reasonable and did not violate the constitutional rights of the defendant.

The defendant's attack upon the legal sufficiency of count III of the indictment is also phrased in constitutional terms. This count charged that the defendant "committed the offense of felony theft" and it alleged that he had previously been twice convicted of theft of amounts not exceeding $150. In denying his motion to dismiss this count, the trial court directed that evidence of the defendant's prior convictions was not to be introduced at trial. The defendant now contends that the use of the term "felony theft" deprived him of his right to be apprised of the nature of the accusation against him, because the Criminal Code does not describe any offense as "felony theft." This contention is without merit.

The Criminal Code provides that the first conviction of theft of property not exceeding $150 is punished as a misdemeanor. (See Ill. Rev. Stat. 1967, chap. 38, pars. 2—11, 16—1.) A second or subsequent offense is punished as a felony. (See Ill. Rev. Stat. 1967, chap. 38, pars. 2—7, 16—1.) Since the indictment charged previous thefts, the use of the characterization "felony theft," while not necessary, can hardly be said to have deprived the defendant of his constitutional right "to be advised of the nature and cause of the accusation against him." At worst, the use of the word "felony" is surplusage and we fail to see how defendant was prejudiced by its inclusion.

Similarly, we find no substance to defendant's sweeping contention that "to permit prior convictions to be alleged in the indictment can and did have no other effect than to confound and confuse the defendant in ascertainment of the nature and cause of the accusation against him and to deprive him of his constitutional rights to due process and equal protection of the laws." The indictment clearly sets forth the current charge of theft; the additional information it provided concerning prior convictions informed the defendant of the applicability of the recidivist punishment that the legislature has provided.

The defendant also argues that the State's evidence failed to establish the crime of burglary beyond a reasonable doubt. His position is that since the laundromat was open to the public at the time in question, he could have entered as a business invitee, and that without convincing proof to the contrary, "his presence in the store is as consistent with his innocence as with his guilt of the criminal intent at the time of his entry." While a common-law breaking is no longer an essential element of the crime of burglary (see Committee Comments, S.H.A., chap. 38, par. 19—1; *People* v. *Brown* (1947), 397 Ill. 529), the statute requires an entry which is both without authority and with intent to commit a felony or theft. (Ill. Rev.

Stat. 1967, chap. 38, par. 19—1.) A criminal intent formulated after a lawful entry will not satisfy the statute. But authority to enter a business building, or other building open to the public, extends only to those who enter with a purpose consistent with the reason the building is open. (See *People* v. *Brown,* 397 Ill. 529, 530.) An entry with intent to commit a theft cannot be said to be within the authority granted patrons of a laundromat.

The defendant testified that he entered the building with York, who wanted to make a telephone call. But other evidence justified the jury's disregarding this testimony, and was sufficient to establish, beyond a reasonable doubt, that the defendant entered with an intent to commit a theft. There was an outside telephone available for York to use. Neither man had any laundry, and the jury could have concluded that the evidence established that when the defendant entered the establishment, he had and intended to use the key which opened the door of the vending machine at which the defendant was discovered.

Finally, the defendant urges that his possession of burglary tools was not established beyond a reasonable doubt. The statute defines as such a tool "any key * * * for use in breaking into * * * any depository designed for the safekeeping of property, or any part thereof, with intent to enter any such place and with intent to commit therein a felony or theft * * *." (Ill. Rev. Stat. 1967, chap. 38, par. 19—2. To show that neither his possession of nor his intent to use such tools was established, the defendant points to his own testimony that he had been in York's car only a short period, that he had seen no keys in the car, and that his strange movements upon being placed in the police car were undertaken in an attempt to alleviate the discomfort of the handcuffs.

Again we find that the State's evidence was sufficient to justify the jury in concluding that all elements of the statu-

tory offense had been established beyond a reasonable doubt. A key had been used to open the door of the vending machine at which the defendant was standing. A key that opened the door of that machine was found in the police car where the defendant had been squirming to the extent of putting one foot on the dashboard. The proof went further, and established that a bag of keys suitable for similar purposes was found in the car in which the defendant rode to the laundromat.

The judgment of the circuit court of Rock Island County is affirmed.

Judgment affirmed.